Reef Industries, Inc. *and* Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board. Case 16–CA–14283

December 21, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On June 15, 1990, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision and in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Reef Industries, Inc., San Benito, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreeing with the judge's conclusion that employee Dillard's discharge violated Sec. 8(a)(1) of the Act, we find it unnecessary to rely on the judge's finding regarding the probable inaccuracy of the testimony of the Respondent's personnel manager at the representation hearing regarding the employees' educational level. As the judge noted, the correctness of the employees' opinion regarding the accuracy of the Respondent's testimony is irrelevant. We also find it unnecessary to pass on the judge's finding that the letter and cartoon themselves ''were part of an employee attempt to get the Respondent to accept the election results,'' since the letter and cartoon were a part of, and related to, the ongoing labor dispute.

Guadalupe Ruiz, Esq., for the General Counsel.
Kerry E. Notestine, Esq. (Bracewell & Patterson), of Houston, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on October 24, 1989,[1] by Amalgamated Clothing and Textile Workers Union, Southwest Regional Joint Board (the Union), and complaint issued on December 1. It alleges that Reef Industries, Inc. (Respondent or the Company), on October 18, discharged employee Mark Dillard because he concertedly complained to Respondent about disparaging remarks concerning employees, and the attitude toward them, on the part of Respondent's personnel manager, in order to discourage employees from engaging in such concerted activities for the purpose of mutual aid or protection. In so doing, the complaint alleges, Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters in Brownsville, Texas, on February 22, 1990. On the entire record, including briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with facilities at San Benito and Houston, Texas, in which it is engaged in the manufacture of plastic and its fabrication into customized covers for industry. During the 12 months preceding issuance of the complaint, a representative period, Respondent purchased and received at its San Benito, Texas facility goods and materials valued in excess of $50,000 directly from points located outside the State of Texas. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations and Structure*

The Company produces plastic at its Houston facility and ships it by company truck to San Benito for fabrication and customizing. The company president, Philip Cameron, and the personnel manager, Diane Schultz,[2] were located at Houston. John Nykiel was the plant manager at San Benito,[3] and Ruth Lotta was the assistant personnel manager, reporting to Personnel Manager Schultz in Houston. Respondent ran three shifts at San Benito, each with a supervisor who reported to Nykiel. The Company had a total of approximately 110[4] to 120[5] employees at San Benito.

B. *The Board Election and Hearing on Objections—Schultz' Testimony*

A union campaign began in July. Dillard attended a union meeting on July 19 and signed a union card. A Board election was scheduled for September 14, and Dillard wore a union T-shirt prior to that date and on the day of the election. According to Dillard, Personnel Manager Schultz ''attended meetings prior to the union election and talked to employees about union activities.'' Armando Aguirre was a

[1] All dates are in 1989 unless otherwise stated.

[2] The transcript spells Schultz' name ''Schulz.'' However, a complaint allegation concerning her supervisory status spells it ''Schultz,'' and Respondent's answer admits the allegation without any change in name. I accept this spelling as correct.

[3] The pleadings establish that Cameron, Schultz, and Nykiel were supervisors and agents of Respondent within the meaning of the Act.

[4] Plant Manager Nykiel's estimate.

[5] Personnel Manager Schultz' estimate.

company observer at the election.[6] The election was won by the Union, and a hearing was held on Respondent's objections to the election. The parties stipulated that the hearing was held on October 14, but witnesses for both parties stated that it was on October 11. Schultz was the company representative at that hearing, and Aguirre was a witness.

Schultz testified that there had been ''confusion'' during the election. On cross-examination of Aguirre during the objections hearing, union counsel asked him to state his educational level—according to Schultz, this was a union attempt to establish that Aguirre was not sufficiently educated to handle the alleged ''confusion.'' According to a transcript of the hearing, Aguirre replied that he completed the 12th grade but did not graduate.[7] Schultz stated at the unfair labor practice hearing that Aguirre, at the prior hearing, also testified that he obtained a ''GED,'' the equivalent of a high school degree. The record in this case does not contain a copy of this particular testimony, and Aguirre did not testify in the current hearing. Respondent submitted a list of employees with educational levels, and Aguirre is stated to have a ''GED.''[8]

Personnel Manager Schultz was then asked by the company attorney at the objections hearing to state the average education of the San Benito employees. Union counsel objected to the question, and the company attorney replied that he ''just wanted to show that (Aquirre) was more educated than most of the other people at the company.''[9] Schultz replied that the average was probably at the 10th grade level.[10]

C. *Employee Reaction to Schultz' Testimony at the Objections Hearing—Preparation of the T-shirt Cartoon and Letter to Schultz*

Dillard was a warehouseman at San Benito, and Oziel Trevino was a shipping and receiving clerk. Both were subpoenaed by the Union to appear as witnesses at the objections hearing, and, together with other employees, were outside the hearing room when Schultz testified. Subsequent to that testimony, an individual in the hearing room reported to employees outside that Personnel Manager Schultz testified the employees had a 10th grade education. This report did not include the fact that the education issue had first been raised by the Union.

Dillard testified that Schultz' testimony ''insulted'' him, and that about 12 employees made similar statements to him. He had a GED himself and other employees had high school degrees. Dillard stated on cross-examination that Schultz' statement was related to working conditions at the plant because of ''the treatment prior and during the union campaign . . . The statement said that the employees had no idea what (they) were doing as far as deciding whether we wanted the Union or not.''

Oziel Trevino averred that he and other employees were ''shocked,'' ''angry,'' and ''upset,'' and made ''[s]tatements ranging from the mistreatment that has accumulated over the years, plus this.'' The ''whole plant heard about it (and) it upset everyone in the plant.'' Former employee Edward Flores, a high school graduate, stated that the Company had been ''taking things away'' from employees and treating them ''like children.'' Schultz' testimony ''upset (him) a great deal.'' Asked by company counsel why the employees objected when Schultz was merely responding to the educational issue raised first by the Union, Flores answered, ''I still believe that it shouldn't have been phrased like that.''

Trevino testified that, a few days after the objections hearing, an employee suggested that Trevino ask Dillard to prepare a cartoon to be placed on a T-shirt and sent to Houston. Dillard was a cartoonist, and had previously distributed cartoons in the plant. Trevino agreed, approached Dillard, and the two of them worked on a draft of a letter. Dillard did further work on the letter at home, and prepared a cartoon on a T-shirt. He showed both of them to Trevino on October 16. The letter reads as follows:

> Dearest Diane,
>
> We here at REEF appreciate your comment made at the hearing October 11, 1989, on behalf of our mentality. As a result of such a flattering, unbiased statement. We here at REEF feel it is in order to present you with this token of our esteem graditude [sic].
>
> We hope you value it and cheerish [sic] it, as much as we value your opinion of us.
>
> Sincerely,
> S.B. REEF EMPLOYEES
>
> P.S. Flattery will get you nowhere![11]

The cartoon on the T-shirt portrays a strange-looking, cross-eyed individual suggesting low intelligence. Surrounding this figure, in letters occasionally written backwards, is the legend: ''Don't Ask Me! Duh. I Dunno? I've Got a 10th Grade Education.'' The legend ''MAD ODDSCENCES (C) '89 ''also appears on the cartoon in smaller print.''[12]

Dillard and Trevino made a copy of the cartoon on the T-shirt, and showed this copy and the letter to other employees in the plant. They approved, and agreed that the T-shirt and letter be sent to Houston.

Trevino affirmed that the purpose of the letter was ''to see if she (Schultz) could take an insult the way we felt insulted.'' However, he and Dillard took care to exclude ''bad words or any really derogatory statements.'' Edward Flores testified that Dillard showed him the letter, and that he and another employee agreed that it should be sent to Houston. On cross-examination, Flores denied that the employees wanted to ''get back'' at the personnel director. Asked whether the T-shirt and letter made Schultz ''look bad,'' Flo-

[6] The record shows only that Aguirre was an ''observer.'' However, it also indicates that he was cross-examined by union counsel at the subsequent hearing on objections, and I infer from this fact that he was a company observer.

[7] R. Exh. 3.

[8] R. Exh. 4.

[9] G.C. Exh. 5.

[10] Subsequent to her appearance at the objections hearing, Schultz testified, she consulted her records and ascertained that the ''average'' educational level of those San Benito employees who had indicated same was at the 10.7 grade level.

Schultz prepared a summary of her records on February 20, 1990, for the unfair labor practice hearing, showing educational levels of San Benito employees. Although Schultz stated that some listed employees were no longer employed at the time of the hearing, and others not listed had been added since October, she declared that the summary correctly stated the educational levels as of October 1989. The list itself shows 108 names, 11 of which do not state any educational level. Of the 97 employees with listed educational levels, 60 indicated that they either had a high school diploma or a ''GED'' (R. Exh. 4).

[11] G.C. Exh. 3.

[12] G.C. Exh. 4.

res replied: ''Not really, it didn't make her look bad. No, her remark made her look bad.''

Dillard handed the T-shirt and the letter to Trevino in a box with Schultz' name on it. A truck was leaving for Houston that night, and, Trevino, as shipping clerk, gave the box to the driver.

A copy of the letter was posted on the bulletin board, and a copy of the cartoon inserted under Plant Manager Nykiel's office door. Former employee Flores testified that it was ''all over the plant.'' His own supervisor ''knows what's going on every minute of the day in that plant (and) must have been blind if he did not know what was going on.''

D. *The Company's Investigation and Discharge of Dillard*

1. Summary of the evidence

Personnel Manager Schultz testified that she was ''shocked'' upon receipt of the T-shirt with its cartoon, and the letter. She considered it to be a ''put-down'' and ridicule of management with respect to her testimony at the objections hearing, which was given ''very honestly.'' The cartoon was ''discrediting to (her) ability to supervise and manage.'' Houston employees saw the cartoon and laughed at it.

Schultz stated that she assumed that the T-shirt was from Dillard because of his initials, ''MAD,'' on the shirt. She also assumed that the letter came from Dillard, because it ''accompanied'' the T-shirt. However, Schultz agreed that, on the basis of the language of the letter—''We here at REEF,'' and the signature, ''S.B. REEF Employees''—a reasonable person would assume that more than one person was involved.

Schultz affirmed that she first called San Benito Plant Manager Nykiel, and asked him whether he was aware of the material. Nykiel replied that a copy of the cartoon had been placed underneath his door. According to Schultz, she asked Nykiel whether he thought Dillard had designed the cartoon, and directed him to talk to other employees and ''to investigate and see if he could find out who was involved in this.'' Nykiel gave a slightly different version of this conversation. He testified that Schultz asked him to locate other cartoons which Dillard had drawn, and to ''fax'' them up to her. Nykiel was able to do so, and Schultz sent him a copy of the letter by the same means. Nykiel did not specifically testify that Schultz instructed him to find out who was ''involved'' in the matter, or to speak to other employees.

Schultz declared that she received from Nykiel the copies of other cartoons drawn by Dillard and that ''the signatures matched,'' but that she wanted to ''investigate thoroughly.'' She spoke with Company President Cameron, reported her reaction to the materials, and told him that ''they should be terminated once we (have) investigated and found out.'' Cameron agreed.

Schultz testified that she called her personnel assistant in San Benito, Ruth Lotta, and Danette Montabo (apparently a personnel employee), and asked them whether they were aware of any other employees involved in the matter. Schultz testified that Lotta and Montabo were ''in and out of the plant, and the employees talk about things like this, so normally they know what's going on there.'' According to Schultz, Lotta said that she would check on the matter, then called back and said that she ''knew nothing.'' Schultz did not ask Lotta to identify the employees with whom she had spoken, and did not ask for a written report. Neither Lotta nor Montabo testified at the hearing.

Nykiel testified that he suspected that Trevino was involved. He was ''the shipping clerk on that shift and basically . . . they could not have got (it) on the truck . . . I mean they could have but (it is) unlikely that it could have gotten on the truck without Oziel's cooperation . . . .'' Nykiel contended that he talked to supervisors and asked them whether they knew ''who was involved.'' According to Nykiel, the supervisors replied that they knew nothing. Nykiel did not instruct them to ask employees about the matter, and did not himself question Trevino or any other employee. None of the supervisors testified at the hearing.

Schultz called Nykiel again after receipt of the additional Dillard cartoons. She stated that she had compared them, and directed Nykiel to talk to Dillard. If the latter admitted authorship, he was to be terminated. Schultz testified that this was her decision.

Nykiel then prepared a notice terminating Dillard ''immediately'' for ''unsubordination [sic].''[13] and, thereafter, called Dillard in for an interview. Nykiel stated that this procedure was ''standard''—the notice could have been discarded if Dillard had denied involvement.

Nykiel asserted that he called Dillard into the personnel office, showed him the cartoon and letter, and asked whether he had sent them to Schultz. According to Nykiel, Dillard replied, ''Yes.'' Nykiel contended that he asked Dillard whether other employees, specifically Trevino, were involved, and that Dillard denied it. Nykiel stated that he asked Dillard the reason for sending the T-shirt and letter, and that the latter responded that he ''wanted to get into making T-shirts and wanted Diane's (Schultz') opinion on it.'' When Nykiel questioned this, Dillard assertedly replied that ''it was just a joke'' and that he thought it was ''funny.'' Nykiel replied, according to his testimony, that the Company did not think it was funny, and that Dillard was terminated.

Dillard gave a different version of the exit interview. ''He (Nykiel) asked me if I had seen the letter before. I didn't give him a direct answer. I kind of shook my head because . . . Trevino was involved and I didn't feel like I had to explain anything to him at that time.'' Dillard denied that Nykiel asked him whether other employees were involved. The supervisor told him that his initials were on the cartoon, and that he was discharged for insubordination.

Schultz testified that the investigation ''ended'' when Dillard assertedly admitted authorship and failed to name other employees. Since ''he didn't name any others, he was taking it on himself to represent'' the employees. Schultz contended that the investigation changed her ''initial impression'' that other employees were involved and, accordingly, that she had no knowledge of other employee participation in the matter.

2. Factual analysis

The evidence is insufficient to establish that Respondent's ''investigation'' included the questioning of any employee other than Dillard. Schultz' testimony on this issue has no probative weight—it was hearsay, and she failed to ascertain the names of employees assertedly questioned by the San Be-

[13] G.C. Exh. 2.

nito personnel department or to require a written report. I do not credit Schultz' assertion that she instructed Nykiel to question other employees. Nykiel did not corroborate this aspect of Schultz' testimony, and, clearly, he did not question other employees or instruct his supervisors to do so.

It is also obvious that Nykiel prepared Dillard's termination notice before interviewing him. Nykiel's contention that he asked Dillard whether Trevino or other employees were involved was denied by Dillard and is inconsistent with his actual conduct of the ''investigation''—he could easily have asked Trevino these questions himself, or could have directed his supervisors to make the inquiries. Nykiel's failure to do so is incongruous in light of his admitted suspicion that Trevino was involved. His statement that Dillard said he planned to make T-shirts and wanted Schultz' ''opinion'' is implausible. It is also improbable that Dillard would have characterized the letter and T-shirt as ''just a joke'' in light of his and other employee opinion that Schultz' testimony was insulting. Dillard's account of the exit interview, with his failure to make an outright admission and his desire to protect Trevino, is more realistic. Further, Dillard's demeanor on the witness stand was that of a truthful witness. Accordingly, I find, Nykiel asked but Dillard did not admit authorship of the letter and T-shirt. Nykiel did not ask Dillard whether other employees were involved, and discharged Dillard because his authorship was established by his initials on the T-shirt.[14]

E. *Legal Analysis and Conclusions*

1. Applicable principles

Section 7 of the Act gives employees the right to engage in ''concerted activities'' for ''mutual aid or protection,'' and Section 8(a)(1) declares it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights set forth in Section 7. The Board has stated the law as follows:

> In general, to find an employee's activity to be ''concerted,'' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[15]

2. The concerted nature of the employee activity

It is obvious that Dillard engaged in preparation and shipment of the letter and T-shirt both with and on the authority of other employees. The initial request was made to Trevino by another employee, and he and Dillard cooperated in the preparation of the documents. Thereafter, Dillard sought and obtained the agreement of other San Benito employees to send the documents to Personnel Manager Schultz in Houston. In order to accomplish this, he again needed and obtained the cooperation of shipping clerk Trevino. I find that Dillard and other employees were engaged in concerted activity.

3. Respondent's knowledge of the concerted nature of the activity

Respondent's argument that it was without knowledge of the concerted nature of these activities is not persuasive. Personnel Manager Schultz admitted that the language of the letter would suggest to a reasonable person that more than one individual was involved, and recommended to the company president that ''they'' should be terminated. On almost identical facts, the Board with judicial approval has concluded that an employer had knowledge of the concerted nature of his employees' activities. *Oakes Machine Corp*., 288 NLRB 456 (1988), enfd. as modified 897 F.2d 84 (1990).

I do not accept Schultz' testimony that her ''initial impression'' of the concerted nature of the activities was corrected by the Company's investigation. The investigation was a sham. No employee other than Dillard was questioned. Nykiel's report and Lotta's asserted report to Schultz that their supervisors ''knew nothing'' are unbelievable in light of testimony, some from Schultz herself, that the supervisors were knowledgeable about plant activity. Adopting her own evidentiary rule, Schultz concluded that no other employees were involved because Dillard did not name any. Application of such a rule would require an employee involved in concerted activity either to disclose to an employer, on demand, the names of other employees similarly involved, or to risk a finding that he was acting alone. Such reasoning is contrary to the policies of the Act, and I reject it. I conclude, on the authority of *Oakes Machine Corp*., supra, that Respondent did have knowledge of the concerted nature of the activities of Dillard and other employees.

4. The protected nature of the employee activity

(a) *Applicable principles*

The Board has declared that the protected nature of employee activity depends on the extent to which it is ''*a part of and related to* the ongoing labor dispute (emphasis in original). *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3d Cir.

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[14] Respondent argues that Dillard should not be credited because he contradicted himself several times. Thus, Dillard testified that he did not know he could be discharged for insubordination, whereas this testimony is allegedly contradicted by company rules and by Dillard's testimony at an unemployment compensation hearing (R. Br. p. 23, fn. 5). A copy of the rules which Dillard signed is in evidence, but says nothing about insubordination or ridicule of management. A ''catchall'' phrase at the end reserves to management the right to discipline employees ''for any offense of the like or similar nature . . .'' (R. Exh. 1).

Dillard's testimony at the unemployment compensation hearing, elicited somewhat ambiguously on cross-examination, does not contain the asserted contradiction.

Respondent further argues that Dillard, at the compensation hearing, contended that Schultz compared Reef employees to ''blacks,'' ''cripples,'' and ''mental retards,'' but later recanted this testimony. There is no explicit evidence of Dillard's former testimony on this subject, and he credibly testified at the unfair labor practice hearing that this was his own characterization of Schultz' testimony, not language he attributed to her.

[15] *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985) (*Myers I*); reaffd. in *Meyers Industries*, 281 NLRB 882, 885 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) (*Meyers II*).

1980).[16] The Supreme Court has stated that ''some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause.'' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978). However, in that case the Court, affirming the Board's determinations, concluded that sections of a union newsletter, distributed on company property, which encouraged employees to write their legislators in opposition to a proposed state right-to-work law, and which criticized a Presidential veto of a proposed increase in a Federal minimum wage bill, came within the protection of the ''mutual aid or protection'' clause (id.). The Board has recently concluded that an employee's testimony before Congress ''in support of legislation that the Respondent considered inimical to its interests'' constituted protected activity.[17]

The Board has held employee activity to be similarly protected where it involved newspaper employees' letters to advertisers stating that circulation was declining and the newspaper was ''speeding downhill''[18]; statements of striking subcontractor employees to the general contractor that the subcontractor had no money, never paid his bills, was ''no damn good,'' and that the job was ''too damn big'' for him;[19] an employee letter to a parent company attacking the employer's organizational structure and the adequacy of its product;[20] a steward's letters to customers arguing that the employer's procedures were unsafe;[21] and an employee's letter to a parent company seeking to replace a supervisor.[22]

The Board has also concluded with judicial approval that an employee walkout protesting a supervisor's failure to discipline another employee was protected, since ''the quality of supervision and the manner in which it is exercised are directly related to working conditions, and the banding together of employees to protest the way in which supervision is exercised . . . is protected concerted activity.''[23] In another case employee notices accusing a supervisor of ''malice, gross negligence, carelessness, dissembling,'' and an attempt to shift blame to an employee were held to be protected.[24] In a concurring opinion, Member Penello declared that the employee was ''merely attempting to make Respondent and employees aware of the nature and extent of dissatisfaction, and to call the attention of employees to matters of serious and legitimate concern to fellow employees such as safety, improper training, and discipline.''[25] In its enforcing decree, the Court of Appeals for the Seventh Circuit stated that ''[a] protest arising from allegedly improper supervisory conduct furthers the 'mutual aid or protection' of the employees, particularly where the supervisor's actions imperil the safety of the workers and also may result in their unwarranted discipline.''[26]

(b) *The employees' activity*

It is obvious that there was an ongoing labor dispute in this case—the representation proceeding. The employee activity was a direct response to Personnel Manager Schultz' testimony at the objections hearing. Respondent has characterized that testimony as truthfully given under oath in response to an issue first raised at the hearing by the Union.[27] It is undisputed that the educational issue was first raised by the Union. Whether the employees' opinion of the accuracy of Schultz' testimony was correct is irrelevant, since the Board with judicial approval has concluded that employee allegations protesting management action constitute protected conduct notwithstanding inaccuracy of any allegation, provided that it is not deliberately or maliciously false. *Walls Mfg. Co. v. NLRB.*, 321 F.2d 7538 (D.C. Cir. 1963), enfg. 137 NLRB 1317 (1962).[28]

In this case, it is by no means clear that Schultz' statement was accurate. Thus, her own records and testimony show that the ''average'' educational level was at the 10.7 grade level rather than the 10th grade which she asserted at the objections hearing. This is closer to the 11th rather than the 10th grade. Further, the use of an ''average'' rather than some other statistical measurement did not fairly represent the educational level of the San Benito employees. Some did not respond to the Employer's question concerning their education, and no valid inferences may be made as to these employees. Of those who did respond to the question, more than one-half had a high school degree or its equivalent. Since the Company's purpose at the objections hearing was to compare Aguirre's education with that of other employees, an appropriate response from the personnel manager would have been that more than one-half of the employees responding to a question about their education were at the same level as Aguirre. Despite the irrelevancy of the accuracy of employee

[16] The Board stated that this principle was embodied in two prior cases, *Richboro Community Health Council*, 242 NLRB 1267 (1979), and *Community Hospital of Roanoke Valley*, 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976).

[17] *Alaska Pulp Corp.*, 296 NLRB 1260, 1261 (1989). The Board held that an employee letter attacking the company's management and including accusations of double bookkeeping, a conspiracy to force other corporations out of business, and misrepresentations ''by a few self serving greedy individuals'' (ibid.), also constituted protected conduct.

[18] *Sierra Publishing Co.*, 291 NLRB 540, 542 (1988), enfd. 889 F.2d 210 (9th Cir. 1989).

[19] *Emarco, Inc.*, 284 NLRB 832, 833 (1987). The Board stated that its decision was consistent with *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), in that employee appeals to third parties in an ongoing labor dispute are protected if they are ''not so disloyal, reckless, or maliciously untrue (as) to lose the Act's protection'' (id., 284 NLRB at 833).

[20] *Mitchell Manuals*, 280 NLRB 230 (1986). The Board noted that the employees' recommended remedy to the parent company included a reference to wage standards, and thus linked the letter to a prior discussion on wages which the employees had engaged in with the employer.

[21] *Allied Aviation Service*, supra. The steward had filed grievances which did not discuss the safety issue. Disagreeing with an administrative law judge, the Board characterized the steward's action as a tactical device not determinative of the relationship between the letters and the ongoing labor dispute.

[22] *Oakes Machine Corp.*, supra. The Court of Appeals for the Second Circuit noted, on the ''exceptional facts'' of the case, that the protest originated with employees, the supervisor dealt directly with them, his identity related to working conditions, and the method of protest was reasonable.

[23] *Leslie Metal Arts Co.*, 208 NLRB 323, 326 (1974), enfd. 509 F.2d 811 (6th Cir. 1975).

[24] *Dreis & Krump Mfg.*, 221 NLRB 309, 312–313 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board related the notices to a prior grievance, even though the notices did not specifically ask the employer to do anything, and accepted the administrative law judge's conclusion, supported by numerous authorities, that ''offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service'' (id. at 315).

[25] Id. at 310.

[26] 544 F.2d at 327.

[27] R. Br. pp. 4, 10–11.

[28] See also *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344–345 (1938); *Detroit Forming, Inc.*, 204 NLRB 205, 212 (1973); *Spinoza, Inc.*, 199 NLRB 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973).

opinion concerning Schultz' testimony, I conclude that the employees' view that the personnel manager had understated their educational level was reasonably grounded in fact.

In summary, the employees assessed Schultz' testimony as an inaccurate statement of their educational levels. The employees' education was obviously related to the employment relationship, since Respondent asked employees or job applicants questions about their education. Schultz' statement about their educational level came from a company official who had opposed the Union during the campaign, and who was testifying at the objections hearing in an attempt to set aside the Union's victory in the election.

Respondent argues that the employees' letter did not constitute protected activity because it did not request ''Schultz or other management to take any particular action.''[29] This argument has been rejected by the Board in *Dreis & Krump*, supra, and by the Supreme Court in *Eastex*, implicitly in its conclusions finding employee appeals to persons other than the employer to be protected conduct, and explicitly in its rejection of that argument made by the employer. 437 U.S. at 572.

Moreover, the argument is factually inaccurate in this case. It is apparent that the union proponents wanted, and the Company opposed, their union representation. It was unnecessary for the union proponents to articulate their wish that the Company drop its objections and accept the result of the election—this was obvious. The letter and cartoon were part of an employee attempt to get Respondent to accept the election results. Accordingly, because of the connection of the educational issue to the employment relationship, the probable inaccuracy of Schultz' testimony concerning an element in that relationship, her active opposition to the Union, and the ongoing status of the representation proceeding, I conclude that the employees' protest against her testimony was sufficiently related to their working conditions to come within the mutual aid or protection clause of the Act.

There remains for consideration the issue of whether that protest took a form which would bar it from the protection of the Act. The letter itself was a form of mild sarcasm, and the cartoon portrayed an imaginary employee of low intelligence—the employees' view of Schultz' characterization of them. Respondent cites several decisions to support its contention that this form of employee protest was impermissible. The principal case, *Caterpillar Tractor Co*., 276 NLRB 1323 (1985), also involved a cartoon. However, in that case the cartoon pictured an actual supervisor, not an imaginary employee. Further, the supervisor was portrayed with animal-like characteristics, ''clearly defined male genitals,'' and was engaged in excretory functions while uttering obscenities. The Board concluded that this cartoon was ''malicious, defamatory, insubordinate, obnoxious, and wholly unjustified'' (id. at 1326). It is obvious that Dillard's cartoon is not remotely comparable—it did not portray a management figure, and was not obscene or obnoxious.[30] Although Trevino stated that an object of the letter was to see whether Schultz could take an insult as the employees were insulted, he added that he and Dillard took care to exclude ''bad words or any really derogatory statements.'' Flores denied that the T-shirt and letter made Schultz ''look bad''—it was her testimony that made her ''look bad.'' Schultz' assertion that the letter and cartoon prevented her from supervising is undocumented and exaggerated.

I conclude, based on the numerous authorities cited above, that the means which the employees utilized to state their protest were not so ''offensive, vulgar, defamatory, or opprobrious'' as to exclude them from the protection of the Act. Accordingly, the protest constituted protected activity.

It is obvious that Dillard was discharged for his part in the letter and cartoon. Inasmuch as I have concluded that this constituted permissible concerted employee activity for mutual aid or protection, Respondent's discharge of Dillard, for this reason, was violative of Section 8(a)(1) of the Act. I so find.[31]

CONCLUSIONS OF LAW

1. The Respondent, Reef Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging employee Mark Dillard on October 18, 1989, because of his protected, concerted activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that the Respondent unlawfully discharged Mark Dillard on October 18, 1989, it is recommended that Respondent be ordered to offer Dillard immediate reinstatement to his former position, or, if such position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill the position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[32]

[29] R. Br, p. 14.

[30] Other cases cited by Respondent, are similarly inapposite. Thus, in *Finlay Bros. Co*., 282 NLRB 737 (1987), the employee repeatedly disobeyed orders to wear a uniform and fabricated employee opposition to the order. In *American Arbitration Assn.*, 233 NLRB 71 (1977), the employee violated the confidentiality on which her employer depended, and ridiculed it in letters to lawyers and arbitrators. These actions are not comparable to the employee activity herein.

[31] Although the fact that Dillard's discharge notice was prepared before he was interviewed would normally, under Board law, be considered to be evidence of a violation of Sec. 8(a)(3) of the Act, it is unnecessary to consider this factor in light of the complaint allegations.

[32] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

In addition, an expunction order and the posting of notices by Respondent are warranted.

On these findings of fact and conclusions of law and upon the entire record, I recommend the following[33]

ORDER

The Respondent, Reef Industries, Inc., San Benito, Texas, it officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging employees because of their protected concerted activities.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Mark Dillard immediate reinstatement to his former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may suffered by reason of Respondent's unlawful discrimination against him, in the manner described in the remedy section of this decision.

(b) Expunge from its personnel records or other files any references to its discharge of Mark Dillard on October 18, 1989, and notify him in writing that this action has been taken and that evidence of such discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its San Benito and Houston, Texas facilities copies of the attached notice marked ''Appendix.''[34] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondents authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representative of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer Mark Dillard immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any references to the discharge of Mark Dillard, and notify him, in writing, that has been done and that evidence of the unlawful discharge will not be used against him in any way.

REEF INDUSTRIES, INC.

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[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''